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No. 83-1278

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEWIS SERVICE CENTER, INC., PETITIONER

v.

MACK TRUCKS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JEROLD J. GANZFRIED
Assistant to the Solicitor General

BARRY GROSSMAN
EDWARD T. HAND
Attorneys

Department of Justice
(202) 633-2217
Washington, D.C. 20530

QUESTION PRESENTED

Whether, on the facts of this case, the court of appeals correctly concluded that a truck manufacturer's program of sales assistance to its dealers did not constitute resale price maintenance or any other per se violation of Section 1 of the Sherman Act, and was not anticompetitive on balance when viewed under the rule of reason.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1273

LEWIS SERVICE CENTER, INC., PETITIONER

v.

MACK TRUCKS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

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[1] The Appropriations Act of 1984 for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies contains a provision stating that the covered agencies are prohibited from engaging in any activity "the purpose of which is to overturn or alter the per se prohibition of resale price maintenance in effect under the Federal antitrust laws." Pub. L. No. 98-166, § 510, 97 Stat. 1102 (1983); see Pet. App. 26. This provision specifically excludes coverage of the federal courts and was not intended to "restrict [the Executive's] authority to argue before the Federal courts," within the framework of "existing case law." H.R. Conf. Rep. No. 98-478, 98th Cong., 1st Sess. 46 (1983). Contrary to the questions

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 714 F.2d at 842. The memorandum and order of the district court denying respondent's motion for judgment notwithstanding the verdict or in the alternative for a new trial (Pet. App. 19-23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1983. A petition for rehearing was denied on November 4, 1983. The petition for a writ of certiorari was filed on February 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Lewis Service Center, Inc. is a large retail dealer of trucks manufactured by respondent Mack Trucks, Inc. ("Mack").[2] This lawsuit concerns

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presented in the petition, this case does not raise any question concerning the criterion to be applied to ascertain the legality of resale price maintenance. The court of appeals held that resale price maintenance agreements are illegal per se (Pet. App. 7-8) and neither party has challenged that rule of law. Instead, petitioner disagrees with the court of appeals' fact-bound conclusion that the sales assistance program at issue did not constitute resale price maintenance. Accordingly, the Solicitor General believes (with the concurrence of the Assistant Attorney General, Office of Legal Counsel) that the present response to the Court's request for the views of the United States in this case raises no question of inconsistency with the provision noted above.

[2] According to petitioner, Mack has the second largest market share among domestic truck manufacturers (18.4%) and three other manufacturers account in the aggregate for 55% of truck sales nationwide (Pet. 5 n.1).

Mack's nationwide sales assistance program, pursuant to which Mack gave petitioner a reduced wholesale price when necessary to meet interbrand retail price competition.

1. As described by the court of appeals (Pet. App. 4-5), Mack's sales assistance program is triggered when a dealer identifies the interbrand competition (*i.e.*, the competitor and the price) that must be beaten to make the sale.[3] If Mack decides to grant sales assistance, it reduces the wholesale price to the dealer by an amount that guarantees the dealer a specified minimum profit (generally 4%). As a matter of bookkeeping, however, the dealer wholesale price is not discounted directly. Rather, Mack builds the trucks to order and initially charges the dealer the standard wholesale price. The dealer then reports the final sale price and its own costs. If the dealer's profit is less than the guaranteed amount, Mack indirectly reduces the standard wholesale price by crediting the dealer's truck "parts" account with an appropriate sum. If, however, the dealer's profit exceeds the guaranteed amount, Mack gives the dealer a smaller credit or no credit.[4]

As noted above, Mack offers sales assistance to its dealers only when they request it. During the period from 1978 through 1980, the majority of trucks sold

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[3] Since these trucks are custom-made, the resale price varies with each transaction (see Pet. App. 8-9).

[4] The district court described this procedure in a slightly different way (Pet. App. 21): "If Mack Trucks finds that the profit exceeds the four per cent [guaranteed minimum] or a figure it considers unreasonable, Mack Trucks then reinstates the full amount of the list price or something less than the full amount of the list price but above the amount agreed to at the time the sales assistance was requested * * *."

by the ten Mack dealers in petitioner's region was sold without sales assistance, and petitioner was the only such dealer that sold more than one-half of its custom-ordered trucks under the program (Pet. App. 13-14).[5]

2. Petitioner filed this antitrust suit against Mack in 1980, alleging that the sales assistance program constituted resale price maintenance, a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The complaint alleged that the manner in which Mack administered its sales assistance program had the practical effect of financially coercing the participating dealer to adhere to a manufacturer-determined resale price. Petitioner argues that Mack set its wholesale price at an artificially high level, thus forcing petitioner to make most of its sales pursuant to the sales assistance program. It claims that Mack then used its sales assistance program to place a ceiling on the amount that its dealers could charge.[6] Petitioner further asserts that the program unreasonably limited its profits on Mack-assisted sales and de-

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[5] Petitioner notes that in certain years, other dealers in its immediate vicinity relied heavily on the sales assistance program (Pet. 7 & n.4). The apparent discrepancy between petitioner's figures and those cited by the court of appeals is explained by petitioner's selection of only some of the years in the period (and in one case, a year outside the period) considered by the court.

[6] Petitioner argues that an upward deviation by the dealer from the resale price on which Mack's sales assistance offer was based would result in punitive action by Mack; *i.e.*, that the manufacturer could—and often did—revoke its wholesale price discount *in toto*, rather than adjust it so that the greater-than-anticipated profit could be shared by Mack and the dealer (Pet. 5-8).

nied it the opportunity freely to negotiate with customers (see Pet. 9; Pet. App. 3, 5).

Following a trial, the jury returned a general verdict in favor of petitioner and awarded $300,000 in damages, which were trebled upon entry of judgment. The district court denied Mack's motion for judgment notwithstanding the verdict or in the alternative for a new trial (Pet. App. 19-23).

3. The court of appeals reversed, holding that "under the undisputed evidence Mack's sales assistance program does not violate the Sherman Act * * *" (Pet. App. 3). The court began by recognizing that resale price maintenance is per se unlawful and that other, "more subtle," pricing practices are per se illegal where judicial experience has shown them to be anticompetitive (*id.* at 7-8). After examining the record, however, the court determined that Mack's program did not constitute "either an obvious price-fixing scheme to which the per se rule automatically applies, or a more subtle vertical restraint" that should be deemed unlawful per se (*id.* at 8).

In reaching its conclusion, the court found (Pet. App. 8) that Mack "neither directly nor indirectly fixed the price at which [petitioner] ultimately sold its trucks." Mack never suggested resale prices to petitioner, never required it to adhere to the resale price proposed by petitioner in requesting sales assistance, and never refused to sell trucks to petitioner because of dissatisfaction with resale prices (*id.* at 8-9). Rather, if the dealer obtained a profit above the amount guaranteed by Mack, the manufacturer either withdrew its discount or reduced it to an amount that enabled the dealer to obtain the guaranteed profit (*id.* at 4-5). Under the program, the court reasoned, Mack merely determined the maximum amount by which it was willing to (*id.* at 9):

> reduce its wholesale price (and thereby its profit) in order to assist the dealer in selling a Mack truck. In granting such a discount, Mack may require the dealer to reduce its own profit as well. Mack has a right to ensure that the discount it affords its dealers is passed on to the customer.[7]

For these reasons, the court of appeals held that Mack's sales assistance program could not possibly constitute coercive resale price maintenance or price fixing (*id.* at 10).

The court also considered whether the disputed program might be unlawful per se even if it did not constitute resale price maintenance. After reviewing several decisions that upheld the legality of sales assistance programs, the court concluded that there was "no basis" in the record for finding that this particular program "creates a 'pernicious effect on competition' " that should be deemed per se unlawful (Pet. App. 11-12).

Finally, the court of appeals examined the legality of the sales assistance program under a rule of reason analysis and found it to be reasonable. It found (Pet. App. 13-14) that the "evidence points without contradiction to the conclusion" that the purpose of Mack's sales assistance program was to "promote sales of Mack trucks" (particularly large-volume sales) and that there was no evidence of an intent by Mack "to 'cripple' its dealers." Indeed, the court (*id.* at 14) "fail[ed] to see how Mack's program can be characterized as anything other than procompeti-

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[7] The court noted that petitioner made "a substantial amount of its sales to large volume fleet customers," the type of sales on which dealers often must reduce their profit margin if they are to obtain the order (Pet. App. 10).

tive"; if the program did not exist, there would be less interbrand price competition, the "ultimate customer would * * * probably pay a higher price, and [petitioner] would make no sale or profit at all." [8]

DISCUSSION

The court of appeals' factbound decision does not conflict with any decision of this Court or of any other court of appeals and does not otherwise warrant further review.

1. Under the precedents of this Court, resale price maintenance is a per se violation of Section 1 of the Sherman Act. See, *e.g.*, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).[9] Petitioner's contention that the court of appeals in this case refused to apply the per se rule in "an obvious attempt" to subvert existing law (Pet. 3), mischaracterizes the decision below.[10] The Eighth

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[8] Petitioner also argued below that whether or not the sales assistance program violated Section 1, Mack and a wholly-owned Mack subsidiary had unlawfully conspired to fix the prices of trucks sold by petitioner (Pet. App. 5). Since the court of appeals concluded that Mack did not fix the resale prices of its trucks, the court did not reach petitioner's conspiracy theory (*id.* at 15). Petitioner does not raise the issue here.

[9] In *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (March 20, 1984), the Court expressly declined to reconsider the application of the per se rule to resale price maintenance, observing that the parties had neither raised the issue below nor argued it on appeal. Slip op. 7 n.17.

[10] Although the petition presents four separate questions for review, all four turn on the validity of petitioner's characterization of the sales assistance program as resale price maintenance.

Circuit plainly agreed with petitioner that resale price maintenance is per se unlawful (see Pet. App. 7, 9); it merely found that the record in this case failed to show that the operation of Mack's sales assistance program constituted resale price maintenance (and thus that petitioner had failed to sustain its burden of proof on that issue). In reaching that crucial conclusion about the evidence, the court of appeals adverted to several important factors: the resale price on which the sales assistance was predicated was suggested by the dealer, not by Mack (*id.* at 4); Mack never refused to sell a truck because of petitioner's pricing policies, or terminated or threatened to terminate petitioner or any other dealer because of a dispute over resale pricing; and Mack's program did not have the practical effect of depriving dealers of their resale pricing freedom because it only sought to ensure that any wholesale discount was passed on to the customer (*id.* at 9). These conclusions about the state of the evidence support the court's determination that Mack neither "directly nor indirectly fixed the price" at which petitioner sold its trucks (*id.* at 8); in any case, that factbound determination offers no occasion for review by this Court.[11]

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[11] It is possible, at least in theory, that a manufacturer might employ a sales assistance program as a subterfuge to enforce what in fact is a resale price maintenance scheme. After reviewing the evidence, however, the court of appeals concluded that *this* program was not so used.

We note that on January 12, 1981, the United States filed a civil antitrust complaint against Mack and the National Distributor Advisory Council ("NDAC"), an organization of Mack distributors. *United States* v. *Mack Trucks, Inc.*, Civil No. 81-0102 (E.D. Pa.). The complaint charged that Mack and NDAC had conspired to fix the resale prices of Mack

Petitioner also argues (Pet. 18) that the court of appeals erroneously held that resale price maintenance "is limited to an explicit and exact price set by the manufacturer, where the manufacturer terminates, or threatens to terminate, a dealer, or where the agreements are horizontal." But the court of appeals announced no such general rule. The court did observe—quite properly—that the resale price maintenance cases cited by petitioner all contained one or more of the above factors, none of which was found to exist here (Pet. App. 9). Thus, the court did not purport to fashion a new general rule; it decided this case on its own facts (*id.* at 8-10).

2. Petitioner argues (Pet. 21-25) that even if the program did not constitute resale price maintenance, the court of appeals erred in concluding that it was not otherwise per se unlawful. Petitioner contends that however free resale pricing decisions may have been in theory, Mack set its wholesale price so high as to give dealers a great incentive to rely heavily on sales assistance, thus indirectly limiting the maximum prices that dealers could charge and the profits that they could realize. The court of appeals found this contention to be unsupported by the evidence (Pet. App. 4-5, 8-10, 13-14). Moreover, petitioner's argument seems to rest on the premise that any vertical practice is per se unlawful if it has any indirect effect on price—a premise rejected by this Court in *Monsanto Co., supra*, slip op. at 7, and *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).[12]

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truck parts (not trucks, as in this case), in violation of Section 1 of the Sherman Act. The United States voluntarily dismissed the complaint prior to trial, on July 18, 1982.

[12] As petitioner concedes (Pet. 24), the decisions on which it relies for this proposition all involved explicit maximum resale

In considering whether Mack's program might be per se unlawful even in the absence of resale price maintenance, the court of appeals applied both the rule of *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343-344 (1982)—that the per se rule should apply only to practices that judicial experience has shown to be unreasonably anticompetitive—and the rule of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 58, that vertical practices should not be condemned without good competitive reason (see Pet. App. 11-12). As the court of appeals recognized, judicial experience with sales assistance programs suggests that they possess a significant potential for enhancing consumer welfare by encouraging interbrand price competition.[12] The court of appeals also had reason to find that Mack's assistance program was procompetitive and did not warrant per se condemnation. Mack and its dealers are engaged in a common enterprise: selling trucks at a price customers are willing to pay. Indeed, petitioner concedes (Pet. 24 n.10) that "Mack used the sales assistance program to foster interbrand competition at retail." Under these circumstances, the court of appeals observed that if a dealer wishes to make a sale that can

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price maintenance schemes; for the purposes of this alternative argument, however, petitioner must assume that Mack's program does not constitute resale price maintenance.

[12] See Pet. App. 10-11, citing *AAA Liquors, Inc.* v. *Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1204, 1207-1208 (10th Cir. 1982), cert. denied, No. 82-1512 (May 2, 1983); *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 436-438 (1st Cir. 1974). See also *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 40-41 (5th Cir.), cert. denied, 409 U.S. 1077 (1972) (retail price support system reasonable on its face, but unlawful where used to enforce a resale price maintenance scheme).

be made only by sacrificing a normal profit and the dealer asks Mack to help bear that sacrifice, it is not unreasonable for Mack to require that the dealer trim its profit as well to ensure that the wholesale discount is passed along to the customer.

In short, in concluding that Mack's sales assistance program was procompetitive, the court of appeals carefully scrutinized the evidence in this case, applied the standards established by this Court for determining whether vertical arrangements should be condemned as per se unlawful, and reached a result that is consistent with the decisions of other courts that have faced similar contentions.[14]

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[14] Petitioner objects to the court of appeals' use of a rule of reason analysis, but does not challenge the court's conclusion (Pet. App. 12-14) that the sales assistance program passes muster under such analysis. Nor does petitioner suggest that the court of appeals should have remanded the case for further proceedings in the district court applying the rule of reason—a question that, even if it were presented, would not warrant certiorari in the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

BARRY GROSSMAN
EDWARD T. HAND
Attorneys

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